It thus appears that if the representative in question had also worked for other brands and products distributed by the previous distributor, article L. 122-12 would not have been made to apply. It may thus be important for a foreign manufacturer to make sure that the employees of his French distributor are also assigned to other products.

15. Finally, a bill which, if adopted, would bring about major changes in the rules applicable to distributors and particularly to the termination of distributorship agreements, was submitted to the French Parliament in early 1982.[58] If this draft bill were to become law, exclusive distributors would generally be entitled to an indemnity as compensation for their damage upon the termination or nonrenewal of their distributorship agreements, if such termination or nonrenewal is not justified by serious fault on their part. At least three months' notice of termination would have to be given, such notice being increased by one month per year of contractual relationship beyond the third year. Finally, the manufacturer or supplier would be generally required to repurchase the distributor's inventory upon termination.

In weighing the likelihood of this bill ever becoming law, it should be borne in mind that several similar bills have been unsuccessfully submitted to the French Parliament over the past years. Moreover, the bill in question, as in the case with several hundred other bills every year, was proposed by members of parliament. In France, the percentage of bills sponsored by members of parliament which are enacted into law (as opposed to bills proposed by the government) is extremely low; first, member-sponsored bills are often buried in committee and do not come to the floor and, second, the government's legislative calendar often precludes consideration of those member-sponsored bills which do make it to the floor.

JACQUES SALES

[58]Bill Nr. 713, National Assembly, Second Ordinary Session 1981-1982 (January 28, 1982).

Termination of Sales Agents and Distributors in Belgium

Belgian law is a unique reversal of the usual scheme of protections, which tend to run in favor of both agents and distributors or to cover agents alone. Genuinely independent sales agents are not afforded special protection by

Belgian law. Distributors, on the other hand, enjoy elaborate indemnity and notice protections against termination.[1]

While it is always important to define terms, it is especially so in the context of agents and distributors where in practice the contract does not always properly characterize the parties to the agreement. An independent commercial sales agency agreement refers to "an agreement by which the principal engages the commercial agent, who undertakes for a fixed or indefinite term and for remuneration, to negotiate and conclude commercial transactions in the name of and for the account of the principal without being subject to his authority nor being deemed to be linked to him by an employment contract."[2] A distributorship agreement is defined by the Belgian law on distribution agreements as "any agreement pursuant to which a supplier reserves to one or more dealers the right to sell, in their own names and for their own accounts, products which he makes or distributes."[3]

I. Sales Agents

Since Belgium does not have specific statutory provisions concerning agents,[4] such agreements fall within the scope of the general rules on con-

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[1]*See generally* Puelinckx & Tielemans, *The Termination of Agency and Distributorship Agreements: A Comparative Survey*, 3 NW. J. INT'L L. 452 (1981). Law of July 27, 1961 on the Unilateral Termination of Indefinite Term Exclusive Distribution Agreements, as amended by the Law of April 13, 1971, Moniteur Belge, October 5, 1961 and Moniteur Belge, April 21, 1971 (Belg.). The main work on this subject is G. BRICMONT & J.M. PHILIPS, COMMENTAIRE DES DISPOSITIONS DE DROIT BELGE ET COMMUNAUTAIRE APPLICABLES AUX CONCESSIONS DE VENTE EN BELGIQUE (1977). More recent caselaw is reviewed in Sunt, *Overzicht van de Belangrijkste Rechtspraak met Betrekking tot de Wet van 27 juli 1961 Betreffende Eenzijdige Beëindiging van de voor Onbepaalde Tijd Verleende Concessies van Alleenverkoop, zoals Gewijzigd door de Wet van 13 april 1971*, 1981 JURISPRUDENCE COMMERCIALE DE BELGIQUE (J.C.B.) 431. While outside the scope of the present article, some readers may be interested in a recent discussion of certain tax aspects of using commercial intermediaries in Belgium: *See* Hurner, *Tax Liabilities of a Foreign Seller of Goods Using Commercial Intermediaries in Belgium*, 1982 EUR. TAX'N 347.

[2]This is the definition used in a bill presented to the Belgian Parliament in 1976, which would have, if enacted, provided certain protections for commercial agents. Projet de loi du 25 mai 1976 concernant le contrat d'agence commerciale, art. 1, Doc. Parl. Senat 871, sess. 1975-1976, no. 1. The official French text reads:

> Le contrat d'agence commercial est celui par lequel l'une des parties, le représenté, charge l'autre, l'agent commercial qui s'engage pour une durée determinée ou indéterminée et contre rémunération, de négocier et eventuellement de conclure des opérations commerciales au nom et pour compte du représenté sans être soumis à l'autorité de ce dernier ni être réputé lui être lié par un contrat d'emploi.

[3]Law of July 27, 1961, Moniteur Belge, October 5, 1961, as amended by Law of April 13, 1971, Moniteur Belge, April 21, 1971 art. 1, § 2 (Belg.) The official French text reads:

> Est une convention de vente, au sens de la présente loi, toute convention en vertu de laquelle un concédant réserve, à un ou plusieurs concessionnaires le droit de vendre, en leur propre nom et pour leur propre compte, des produits qu'il fabrique ou distribue.

[4]Although there is no specific protection for independent agents in Belgium, there is statutory protection for employed commercial representatives ("representants de commerce"). Commercial representatives are, as employees, entitled to all the protections given to employees. In addition they are entitled to a clientele indemnity upon termination. The distinction between an independent agent and an employed representative is in theory one of control but in practice is often difficult to discern. Since agents are not statutorially protected, there is a tendency for the courts to find that an individual is an employed representative and not an

tracts provided in the Civil Code. Thus, theoretically, agency agreements are subject to the general principle of freedom of contract. Traditional agency law holds that an agency agreement entered into for an indefinite term and containing no specific termination procedure may be terminated at will and without cause, if the termination is carried out in a such way as to avoid undue hardship or injury to the agent.[5] The parties are also free to choose the applicable law.[6] The lack of statutory provisions has not, however, prevented Belgian courts from intervening in the contractual relationship of the parties in order to ensure that independent agents enjoy a minimal degree of protection against their principals, especially upon termination. A recent trend has developed which holds that termination at will should be an exceptional measure and that, in the absence of cause, the party terminating the agreement should give the other party sufficient notice to alleviate any resulting harm.[7]

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independent agent. On the other hand a company cannot be an employee and thus may be an independent agent or a distributor. Careful drafting of agency agreements involving individuals is important to avoid the relationship being characterized as one of employment. *See* DE THEUX, LE DROIT DE LA REPRESENTATION COMMERCIALE (1975), no. 164.

[5]Willemart, *La résilitation du contrat d'agence autonome*, 1981 JOURNAL DES TRIBUNAUX (JT) 617, 619.

[6]Absent an express or implied choice of law by the parties, the law which governs the agency contract is that with which the contract has the closest ties, *i.e.* the law of the place of performance. S.A. Agecobel v. S.A. Haviland, Judgment of May 10, 1982, Tribunal de Commerce of Brussels, 1983 REVUE DE DROIT COMMERCIAL BELGE 241, 243. This is not the traditional Belgian view which always looks for the intention of the parties and failing that generally applies the law of the place of execution. Watté, *Observations, Criticizing, Judgment of November 12, 1979, Tribunal de Commerce, Brussels*, 1980 J.C.B. 299, 302.

[7]Perhaps it is more exact to say that most of the judgments which have held that a termination was unjust involved cases where no notice was given, but referred at the same time to the intention of the parties or other circumstances which combined with the lack of notice made the termination unjust. Willemart insists that one should not infer from this that lack of notice itself is unjust. Willemart, *supra* note 5. There is a tendency in the caselaw to fix the indemnity for unjust termination in relation to the notice which should have been given. *See, e.g.*, Judgment of Jan. 21, 1981, Tribunal de Commerce, Brussels, 1980 J.C.B. 493. The Tribunal de Commerce of Brussels stated that:

> la faculté de rompre un contrat d'agence à durée indéterminée ne peut s'exercer d'une manière abusive, brutale, intempestive, spoliatrice, arbitraire, sans ménagements, à contre temps, mal à propos ou au détriment de la sécurité des affaires suivant les formules retenues par la jurisprudence.

S.A. Agecobel v. S.A. Haviland, Judgment of May 10, 1982, Tribunal de Commerce of Brussels, 1983 REVUE DE DROIT COMMERCIAL BELGE, 241, 243. The court continued by stating that an unfair termination does not give rise to an indemnity compensating for the lack of notice (agency contracts are terminable at will) but rather an indemnity not for the fact of termination but for the way in which it is carried out. This is also Willemart's view.

For example in S.P.R.L. Keysens & Mac Kay v. Fryma Maschinen, A.G., Judgment of September 3, 1981, Tribunal de Commerce, Brussels, 1982 J.C.B. 630, the court held that 6 weeks' notice terminating a five year agency agreement was insufficient and the reasons given by the principal were of pure convenience. The termination was therefore untimely and unjustified. The court found that taking into account the low turnover realized in relation to his total business and the fact that this was but one of many agencies held by the plaintiff, a notice of about 3 months would have been appropriate. The Brussels Court of Appeals has confirmed that an agent may only claim damages for termination if he establishes the abusive and untimely character of the termination. The judge should examine in each case whether the

However, unless the agreement provides for a goodwill indemnity or an indemnity for clientele, none should be due upon termination, the agent's commissions being theoretically sufficient compensation for the effort of attracting customers.[8] Nevertheless, some courts have ignored this principle and granted an indemnity for clientele in cases where the agent had clearly brought in new customers and was then terminated without indemnity.[9]

Another manner in which courts provide protection to agents is by characterizing the agent as an employee rather than an independent contractor and thus subject to the statutory protections provided for employees.[10]

The principle of freedom of contract in the area of agency is likely to undergo a great change in the future. The Benelux Treaty on independent commercial agents was signed at The Hague in 1973. If it ever enters into force it will provide a minimum notice period and indemnity for clientele. There are also movements on the EEC level for a directive on commercial agents.[11]

II. Distributors

Belgium has provided statutory protection for distributors for more than twenty years. The original legislation only applied to exclusive, indefinite term agreements. Amendments in 1971 broadened the scope of the legislation to cover other categories of distributorships which were assimilated to exclusive ones.

The law on distributorships[12] applies to the following types of agreements:

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rupture was unjustified, *i.e.* done without just cause; brutal, *i.e.* unexpected or sudden; or untimely, *i.e.* inopportune or unseasonal. The court considered that a termination, which was decided by the principal after his prior actions had led the agent to believe that their contractual relations would continue, was brutal or untimely. The principal had indicated to the agent both orally and in writing that he intended to continue his relations with his European agents in the long term and in addition the principal had never complained about the agent's performance. The termination had to be considered to be at least untimely. The court of appeals also upheld the lower court's finding that 12 months' notice would have been appropriate and the awarding of damages equal to the commissions earned by the agent in the year prior to termination. Revertex v. I.P.C., Judgment of October 13, 1980, Cour d'Appel, Brussels, 1981 J.C.B. 148.

[8]Willemart *supra* note 5, at 619, no. 13. Some courts in fixing the indemnity on the basis of equity have taken into consideration the clientele. Generally however the agent is not entitled to such an indemnity, unless specified in the contract. The agent does, however, retain his right to commissions arising from business which was still in course on the date of termination.

[9]*Id.*

[10]*See* note 4, *supra*.

[11]Proposal of December 17, 1976 for a Council Directive to Coordinate the Law of the Member States Relating to Commercial Agents, 20 O.J. Eur. Comm. (No. C 13) 2 (1977) amended by the Proposal of January 29, 1979, 22 O.J. Eur. Comm. (No. C 56) 5 (1979). *See* Vanderhaeghe & Jones, *Current Developments in European Agency Law*, 12 INT'L LAW. 671-75 (1978).

[12]Law of July 27, 1961, Moniteur Belge, October 5, 1961, as amended by Law of April 13, 1971, Moniteur Belge, April 21, 1971 (Belg.). The law also applies to sub-distributors who in certain cases may claim indemnity directly from the supplier. (*Id.*, art. 5).

1) exclusive distributorships: also known as sole distributorships where the distributor is in fact the only source for the supplier's products in the territory even though his contract may not provide for exclusivity;
2) quasi-exclusive distributorships: where the distributor sells nearly all the products subject to the agreement in the given territory; and
3) onerous distributorships: where the supplier has imposed such serious obligations[13] on the distributor that termination would cause him serious harm.[14]

While the law generally applies only to indefinite term agreements, it provides that a fixed term agreement does not automatically come to an end upon expiration of the term. Such an agreement is terminated only if the party wishing to terminate sends a registered letter notifying the other of the termination, at the earliest six months and at the latest three months before the date of termination. Failure to send such a letter results in the agreement being deemed to have been renewed either for an indefinite period or for the period stipulated in the renewal clause. Moreover, from the third renewal, a fixed term distributorship agreement is deemed to be one for an indefinite term. This is true even if the agreement was amended.[15] Thus the application of the law cannot be avoided by continually renewing the agreement for fixed terms.

The law allows the unilateral termination of a distributorship agreement by the supplier without notice and without payment of an indemnity either for notice or clientele if the distributor has committed a "serious breach."[16] However, serious breach is not defined in the statute. It has been defined by caselaw as being a breach of such nature and gravity as to exclude every possibility of continuing the commercial relationship.[17]

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[13]The legislative history gives the following illustrative list of serious obligations:

— prohibitions on selling outside a particular area;
— prohibition on selling to certain classes of purchasers;
— obligation to install or organize the distributorship outlets according to criteria fixed by the grantor;
— obligation to carry out after-sales service;
— obligation to buy or sell minimum quantities;
— obligation to maintain particular inventory levels of products or spare parts;
— obligation to advertise a particular trademark.

G. BRICMONT & J.M. PHILIPS, *supra* note 1, at 23.

[14]Even where such serious obligations have been imposed, the law will apply only if the distributor will suffer serious harm on termination due to such obligations. *See* G. BRICMONT & J.M. PHILIPS, *supra* note 1, at 24. Serious harm is not defined by the law but Bricmont states that this condition should exclude those distributorship agreements containing serious obligations in which the costs of these obligations have been fully amortized over the course of the agreement. *Id.*

[15]Law of July 27, 1961, Moniteur Belge, October 5, 1961, as amended by Law of April 13, 1971, Moniteur Belge, Apr. 21, 1971 (Belg.) art. 3 bis.

[16]*Id.* at art. 2, *See* Judgment of Mar. 8, 1977, Tribunal de Commerce, Brussels, 1977 J.C.B. 409; *see also* G. BRICMONT & J.M. PHILIPS, *supra* note 1, at 31.

[17]Judgment of May 18, 1978, Tribunal de Commerce, Brussels, 1978 J.C.B. 485. An abundant caselaw has developed in an attempt to define this concept of serious fault. A survey of the caselaw may be found in G. BRICMONT & J.M. PHILIPS, *supra* note 1, at 241-352. Exam-

The law's basic purpose is the provision of a mandatory notice and indemnity. Either party may terminate the agreement in the absence of serious fault, by giving a reasonable notice or by paying an indemnity in lieu thereof.[18] The law does not provide any guidelines as to the required notice period. The notice period, or indemnity, may be agreed to only after termination of the agreement. If the parties fail to agree, then the courts may be called upon to decide on the basis of custom and equity.[19] Since the law requires a minimum three month notice to confirm that a fixed term agreement will end, one may assume, by analogy, that three months would be the minimum notice period that a court would consider to be reasonable for termination of an indefinite term agreement. Beyond that, it is difficult to discern a pattern in the caselaw as to what constitutes reasonable notice.[20] The courts do seem to agree that the purpose of the notice period is to allow the distributor sufficient time to find a comparable although not necessarily identical situation.[21] The notice periods granted by the courts

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ples of serious fault include: failure to sell a single product over one and one half years, and failure to offer proof of serious attempts to create a market for the product, Judgment of Oct. 1, 1975, Cour d'appel, Brussels, 1975-1976 Rechtskundig Weekblad 2150; failure to fulfill the conditions set forth in the contract such as sales quotas, Judgment 7 January 1977, Cour d'appel, Brussels, cited in G. BRICMONT & J.M. PHILIPS, *supra* note 1, at 31-32; failure to pay, Cour d'appel Brussels, Judgment of Jan. 29, 1973, cited in G. BRICMONT & J.M. PHILIPS, *supra* note 1, at 33. Serious fault is not necessarily limited to a serious failure to respect the explicit terms of the contract. It would also include a situation where the distributor had been convicted of a crime. *Id.* at 30. Judgment of February 1976, Tribunal de Commerce, Hasselt, unpublished, cited in G. BRICMONT & J.M. PHILIPS *supra* note 1, at 30.

[18]Law of July 27, 1961, Moniteur Belge, October 5, 1961, as amended by Law of April 13, 1971, Moniteur Belge, Apr. 21, 1971, art. 2 (Belg.).

[19]*Id.*

[20]*See* G. BRICMONT & J.M. PHILIPS, *supra*, note 1. Some of the factors taken into consideration by the courts include:

- the repercusion of the termination on the total activities of the distributor, e.g. a distributor whose only business is the distribution of the supplier's products needs a longer notice than one for whom the supplier's product(s) is but a fraction of his activity. G. BRICMONT & J.M. PHILIPS, *supra* note 1, at 12 and cases cited therein;
- the presence of extensive obligations on the distributor such as those mentioned at note 13 *supra*;
- the extent of the conceded territory, the clientele was extensive and the supplier was supporting the charges usually paid by the distributor;
- the public renown of the trademark, the distribution of a well-known mark may be hard to replace;
- the duration of the distributorship: this has two effects, in first place it reduces the notice period since the expenses borne by the distributor will have been amortized, on the other hand it extends the period to the extent that it has tied the distributor to the particular product.

[21]Judgment of October 1, 1975, Cour d'appel, Brussels, 1975-1976 Rechtskundig Weekblad 2150; Judgment of May 19, 1978, Tribunal de Commerce, Brussels, 1978 J.C.B. 485; Judgment of April 16, 1976, Tribunal de Commerce, Brussels, 1976 J.C.B. 436. The contract must continue to be performed in the same manner during the notice period as it was before. A court has completely discounted the notice period given where the supplier had violated the distributor's exclusivity during the notice period. Judgment of June 12, 1974, Tribunal de Commerce, Brussels, 1974 J.T. 641.

have run from three months to three years.[22] Absent a reasonable notice period, the terminated party is granted an equitable indemnity[23] to compensate for any loss or damage suffered by the insufficient notice.[24]

An element sometimes considered as being part of the indemnity for insufficient notice is the cost of repurchasing inventory. Some courts have refused to accept claims for this stating that the law does not require it.[25] Other courts have been willing to accept the argument that there is an implicit obligation to repurchase inventory that might have been sold during a proper notice period.[26]

In addition to the notice period, or indemnity, the distributor may be entitled to a complementary indemnity[27] for:

1) the value of any notable increase in clientele;
2) special costs incurred by the distributor which continue to benefit the supplier; and
3) the expenses incurred by the distributor for the termination of his own personnel.

This complementary indemnity may be due even in cases where reasonable notice is given.[28] It is not due if the distributor is terminated for serious cause.

The law does not give any guidelines as to how these factors should be evaluated other than that in the absence of agreement the courts should decide with reference to equity and custom. The law does not specifically state, as it does for the notice period, that the parties cannot provide for this indemnity in their original agreement.[29]

The full application of the law on distributorship agreements may be avoided in several ways. One of the most common is the inclusion in the

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[22]*See* G. BRICMONT & J.M. PHILIPS, *supra* note 1, at 44-47. Rather than run the risk of having given an insufficient notice and thus being condemned to paying an indemnity, the party terminating the agreement may request the court to set a reasonable notice period. *Id.*, at 38.

[23]Law of July 27, 1961, Moniteur Belge, October 5, 1961, as amended by Law of April 13, 1971, Moniteur Belge, April 21, 1971 (Belg.). This indemnity is composed of two elements: (1) the net profit before taxes which he is deprived of during the period and (2) the general expenses which continue.

[24]Judgment of May 3, 1977, Cour d'Appel, Mons, 1977 J.C.B. 348. The loss to take into consideration is not limited to the Belgian territory. If the Belgian distributor's territory included other countries, sales in these must also be included. G. BRICMONT & J.M. PHILIPS, *supra* note 1, at 49.

[25]Tribunal de Commerce, Brussels, Judgment of December 17, 1979, 1980 J.C.B. 135.

[26]Judgment of December 10, 1973, Cour d'Appel, Brussels, unpublished, reported in G. BRICMONT & J.M. PHILIPS, *supra* note 1 at annex XII, 2; Tribunal de Commerce, Brussels, Judgment of April 1, 1976, EMAC/Billman, 1976 J.T. 664.

[27]Law of July 27, 1961, Moniteur Belge, October 5, 1961, as amended by Law of April 13, 1971, Moniteur Belge, April 21, 1971, art. 3 (Belg.). A discussion of this indemnity may be found in Crahay & Jadot, *L'indemnité de clientèle du concessionaire de vente*, 1982 J.T. 609.

[28]Tribunal de Commerce, Brussels, Judgment of April 1, 1976 J.T. 664.

[29]Law of July 27, 1961, Moniteur Belge, October 5, 1961, as amended by law of April 13, 1971, Moniteur Belge, April 21, 1971, (Belg.). Bricmont and Philips believe however that it can only be decided at the moment of termination as is the case for the notice period. G. BRICMONT & J.M. PHILIPS, *supra* note 1, at 63-64.

agreement of an express termination clause allowing the supplier to terminate the agreement with a short notice and no indemnity if the distributor fails to meet defined commercial goals, e.g. sales quotas. The Belgian Cour de Cassation (Supreme Court) has recognized the validity of such clauses,[30] though such clauses may not apply in precisely the situation in which the indemnities will be higher, that is, where the distributor's sales levels have been high.

Suppliers also try to avoid the application of Belgian law by inserting clauses providing for any or all of the following: choice of law, choice of forum and arbitration. The law provides, however, that whenever a distributorship agreement produces effects, even partly, in Belgium, the distributor can bring his action in Belgium either before the court of his domicile or before the court of the supplier's domicile if that is in Belgium. The Belgian court must then apply Belgian law, even when faced with a choice of law clause.[31]

Moreover, Belgium has entered into treaties which would seem to conflict with the law's provision that the distributor may always bring suit in the court of his domicile in Belgium. For example, the 1968 Brussels Convention[32] provides that parties may confer exclusive jurisdiction on the courts of a signatory state.[33] Belgian courts should thus decline jurisdiction if the agreement contains an express choice of forum clause in favor of the courts of the supplier's domicile (if located in a signatory country).[34]

The Cour de Cassation has ruled that the termination indemnity is not an autonomous obligation but a compensatory obligation that replaces the principal obligation, a reasonable notice term. Since the notice must be carried out in Belgium, Belgium is therefore also the place of performance for the substituted obligation of paying an equitable indemnity. Consequently, the Belgian courts have jurisdiction over claims brought by terminated distributors unless the agreement contains a clause enforceable under

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[30]S.A. Vandenbosch v. S.A. Hart and Cooley, Judgment of April 19, 1975, Cour de Cassation, 1980 J.C.B. 440.

[31]Law of July 27, 1961, Moniteur Belge, October 5, 1961 as amended by Law of April 13, 1971, Moniteur Belge, April 21, 1971, art. 4 (Belg.). The scope of application of the law on distributorship agreements has produced an abundant literature. *See* Hayward, *Jurisdiction under the Belgian Law of Termination of Exclusive Distributors: An Exercise in Conflicts of Law and Jurisdiction*, 1979 INT'L LAW. 128, and the references therein. With regard to choice of forum clauses, the Belgian Supreme Court has held that if the distributor sues at the court of his domicile, the supplier cannot oppose this venue based on a choice of forum clause since the law specifically gives the distributor this right. Judgment of June 25, 1965, Cour de Cassation 1965 Pas. I, 1167. Nevertheless, this exceptional provision only applies after termination of the distributorship. It does not apply to disputes arising during the performance of the contract. G. BRICMONT & J. PHILIPS, *supra* note 1, at 96.

[32]Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, O.J. Eur. Comm. (No. L 304) 36 (1978) (*entered into force* on Feb. 1, 1973).

[33]The Convention has been ratified by all of the EEC Member States, except United Kingdom, Denmark and Greece. It may be soon ratified by the United Kingdom.

[34]Judgment of December 9, 1975, Cour d'appel, Mons, Judgment of January 15, 1976, Tribunal de Commerce, Brussels, 1976 J.T. 210.